

National Aeronautics and
Space Administration



EXPLORE SMALL BUSINESS

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OSBP Learning Series:
The Ins and Outs of
Bid Protests

Speaker: Mr. Alex Bakos
June 17, 2020



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About the NASA Office of Small Business Programs

The NASA Office of Small Business Programs (OSBP) is located at the Agency Headquarters in Washington, D.C. and is under the leadership of Associate Administrator Glenn A. Delgado.

Our vision is to promote and integrate all small businesses into the competitive base of contractors that pioneer the future of space exploration, scientific discovery, and aeronautics research.

The NASA OSBP webinar series offers in-depth training relevant to small businesses; and provides the opportunity to ask questions directly to key points of contacts at the Agency.



Meet the Presenter

Mr. Alex Bakos is a Senior Attorney in the Contracts and Acquisition Integrity Practice Group of the NASA Office of General Counsel (OGC). He has served in NASA's legal community since 1996. Bakos began his NASA service at the Goddard Space Flight Center Office of Chief Counsel.

Currently, he serves as team lead for NASA OGC's bid protest practice, and leads the legal community in identifying and promoting best practices for efficient protest practice, developing bid protest training material, as well as tracking and reporting protest data for NASA management at Headquarters and across the Agency.

Bakos received his Juris Doctorate degree from the University of Maryland School of Law in 1992 and has been a member of the State of Maryland Bar Association since 1993. He is also an alum of The Catholic University of America.

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GUEST SPEAKER PRESENTATION

The Ins and Outs of Bid Protests

NASA OSBP Webinar, June 2020

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The Bid Protest System

- **Where may offerors protest?**

- Government Accountability Office
- Court of Federal Claims
- The procuring agency
- Small Business Administration

- **Who may protest?**

- Depends on the type of protest and the forum.
- Awardees may intervene

- **How long is the protest process?**

- GAO: 100 days maximum; may be less if Express Option is used.
- COFC: Not defined, but practices promote reasonably prompt resolution on case by case basis.

- **When is a Protest Timely?**

- GAO
 - Protest of terms of Solicitation: Protester must file before the deadline for receipt of proposals.
 - Post-Award: Generally, protester must file within 10 days of the date it learned of the basis for protest. Consult your legal counsel on all protest matters.
 - Special rule for CICA automatic stay of performance: Protester must file within 10 days of award or within 5 days of a required debriefing.
- COFC
 - Presently, there is no timeliness rule similar to the GAO rule and protester should consult legal counsel in all cases. Legislative proposals have raised this issue.
- SBA
 - Various rules are at play depending upon who is protesting and under what SBA program the protest is filed.

The Bid Protest Legal Framework

- Statutes, primarily the Competition in Contracting Act (CICA)
- Regulations, primarily the Federal Acquisition Regulation (FAR), and agency-specific FAR supplements
- Decisions of bid protest forums
 - Administrative decisions of GAO and SBA
 - Trial court decisions
 - Appellate judicial decision
- Agency solicitation
- Agency selection decision and the record of evaluation

GAO Bid Protest Jurisdiction

- GAO will accept protests of the terms of a solicitation, the cancellation of a solicitation exclusion from the competition (OCI), the award or proposed award of a contract together with evaluation findings underpinning the award, and exclusion from the competitive range.
- Complete GAO rules at 4 CFR Part 21 list the types of protests it will not accept. Notable examples of these are:
 - Protests of subcontract awards
 - Protests of issues assigned to the Small Business Administration (e.g., size protests, 8(a) Program awards, NAICS Code designations)
 - Protests of agency contract administration actions
 - Affirmative determinations of responsibility
 - Task orders under IDIQ contracts, except as provided by statute
 - Although not listed in the protest rules, GAO will not accept protests of awards of grants, cooperative agreements, or agreements under “other transactions” authority.

Differences Between GAO and COFC

Government Accountability Office

- Automatic Stay of Award or Performance is mandatory, subject to timeliness rules.
- The government is represented by agency representative (usually in-house counsel).
- The administrative record and discovery is limited to relevant documents as defined by GAO regulation.
- Decision must be reached in no less than 100 days (65 days if Express Option is used).
- Decision is a recommendation, leaving agency some discretion to correct errors when the protest is sustained.
- GAO rules allow requests for reconsideration. Occasionally, protester may file a COFC protest after a denial at GAO, but this is not an appeal of the GAO decision.

Court of Federal Claims

- Injunction prohibiting performance must be requested. The court will grant or deny preliminary injunction or TRO after consideration of relevant factors.
- Department of Justice represents the U.S.
- The administrative record usually encompasses all procurement documents; discovery is limited.
- No statutory deadline for issuance of decision.
- The court's decision is binding on the agency and the court may define corrective action with as much specificity as the case warrants.
- Appeals to the Federal Circuit Court of Appeals are possible, but rare.

Standards of Review

Government Accountability Office

- GAO's review examines whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria.
- The evaluation of an offeror's proposal is a matter within the discretion of the contracting agency; GAO will question the agency's evaluation where it is unreasonable or undocumented.
- In order to sustain a protest, GAO requires that the agency's error be prejudicial to the protester.

Court of Federal Claims

- The court will uphold a protest for agency action that is arbitrary, capricious, an abuse of discretion, or a prejudicial violation of statute or regulation.
- Where an agency's action has a reasonable basis, the Court will not substitute its judgment for that of the agency.
- The Court's function is limited to "determin[ing] whether 'the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.'"
- For the agency to prevail, it need only articulate "a rational connection between the facts found and the choice made," and the court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

Treatment of Bid and Proposal Information in Bid Protests

Government Accountability Office

- Protective Orders are routinely issued where protester is represented by counsel. Violations are extremely rare and when they do occur they tend to be inadvertent. Sanctions are rare but very significant.
- Where a protester represents itself, the agency submits full report to GAO and redacted version to the protester.
- GAO decisions routinely identify numerical and adjectival scores, past performance information and overall price of the protester and awardee.

Court of Federal Claims

- Protests and records are routinely filed “under seal” to protect proprietary bid and proposal information.
- Practices and procedures exist for parties to propose redactions to decisions.
- [T]he overall contract price is routinely announced in award decisions, and, as the United States Court of Appeals for the Federal Circuit has observed, “an offeror's participation in the procurement process involves some acceptance of risk” that the offeror's price will be disclosed. [*Sys. Application*, 691 F.3d at 1383](#).¹⁴ The disclosure of this price cannot, by itself, render the [agency's] decision to take corrective action unreasonable; otherwise, agencies would be barred from taking corrective action whenever price is shared with potential bidders.

Outcomes and Remedies

Government Accountability Office

- GAO may dismiss a protest without a full agency report if the protest is untimely, if it fails to state a valid protest basis, if it is not within GAO's jurisdiction. Lack of interested party status is rare.
- GAO may deny a protest on the merits in writing, although it may not address every protest allegation in detail.
- GAO may agree to conduct alternative dispute resolution (ADR); e.g, outcome prediction.
- The agency may take corrective action voluntarily and GAO routinely dismisses the protest as academic. If agency takes corrective action after the 30-day report deadline, GAO may award protester's legal fees. GAO may sustain a protest in whole or in part, together with a recommendation for payment of protester's legal fees.
- Remedies most often involve direction to reassess some aspect of the record, and reconsider the decision. GAO virtually never directs the agency to award the contract to the protester.

Court of Federal Claims

- The Court may dismiss the protester as lacking standing. Protest of solicitation terms is untimely after deadline for proposals. Post-award protests are not generally subject to timeliness restrictions.
- Corrective action at the court is not as simple as at GAO. The agency may seek to have the case dismissed, but the outcome is subject to protester challenge.
- Courts may fashion injunctive relief. Judges generally do not put themselves in the position of the agency, so directed awards are not a common form of remedy.
- Protest costs may be available under Equal Access to Justice Act



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OSBP UPDATES

Upcoming Webinars

Date	Topic	Speakers
6/19/2020	Opportunities for New Hampshire Small Businesses to Support NASA Programs	U.S. Senator Jeanne Shaheen New Hampshire NASA Administrator Jim Bridenstine
7/15/2020	How to Business with NASA Ames Research Center and NASA Armstrong Flight Research Center	Christine Munroe NASA Ames Research Center NASA Armstrong Flight Research Center
9/16/2020	How to Do Business With Goddard Space Flight Center and NASA Headquarters	Jennifer Perez NASA Goddard Space Flight Center
10/21/2020	FAR Small Business Updates	Dorice Kenely NASA Office of Procurement

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